

Supreme Court, U. S.
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~~MICHAEL DONK, JR., CLERK~~

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-405 Cr.

GEORGE H. LUSTIG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX D – RELEVANT TRANSCRIPT CITATIONS,
AFFIDAVITS, AND OFFERS OF PROOF

APPENDIX E – RELEVANT MOTIONS AND ORDERS
PRESERVING ISSUES FOR REVIEW

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September 29th, 1977

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APPENDIX D — RELEVANT TRANSCRIPT CITATIONS, AFFIDAVITS, AND OFFERS OF PROOF

TESTIMONY OF CALLIE NEWTON LUSTIG RELATING TO COMMON LAW MARRIAGE

[Transcript of 5/10/76 (Case No. A-76-51 Cr.) at 1964]

Q: How long did you actually live with George?

A: Approximately seven years.

Q: Did you consider yourself married?

A: Yes.

Q: Do you know if he considered you his wife?

A: Yes.

Q: You have two children?

A: Yes.

Q: You said that you have never gone through any kind of ceremony with regard to ministers, Salvation Army, et cetera. Did you ever go through any type of ceremony?

A: We have a very small ceremony, not attended by any witnesses, in 1970.

Q: You say a small personal ceremony. Was the significance of that ceremony to yourself and Mr. Lustig from that point forward that you were married?

A: Yes, we exchanged rings.

Q: Where did that ceremony occur?

A: In the Chitina Valley.

Q: Here in the State of Alaska?

A: Yes.

Q: Now, when, exactly, did you leave Mr. Lustig?

A: September 23, 1975.

**II. TRANSCRIPT REFERENCES
AS TO RIGHT TO COUNSEL, TO CALL WITNESSES,
AND TO PREPARE**

[Transcript of 3/16/76 (case No. A-115-73 Cr.) at 24]

****I don't know if Mr. Lustig wishes me to be his counsel, or if I am the counsel of his choice."

[Transcript of 3/16/76 (Case No. A-115-73 Cr.) at 27]

"MR. FULD. I would have to — based on my brief discussions that I have had with him, it is very difficult. One thing is, it is very difficult to represent a person who is in jail. I feel Mr. Lustig should have the opportunity to consult with other counsel. I am not sure that he would be satisfied with my counsel and this — it is a little hard to go and see him in jail, hard for other people to go in and see him, frankly."

[Transcript of 3/16/76 (Case No. A-115-73 Cr.) at 37]

"So we indicated it was our desire to tie up his liquid assets.***"

[Transcript of 3/16/76 (Case No. A-115-73 Cr.) at 40]

****Otherwise, I don't think there is an attorney in town knowing that order would touch his man. The only thing he's got is property. He doesn't have cash."

[Transcript of 3/16/76 (Case No. A-115-73 Cr.) at 42]

****I think that I have serious problems with the case and Mr. Lustig is trying to interview other attorneys."

[Transcript of 3/16/76 (Case No. A-115-73 Cr.) at 45, 46]

"MR. FULD:***I have reasons I don't really want to state that may make it difficult for me. I think he is entitled to an attorney who will defend him the way he wants to be defended. We may have a difference of opinion how to do that."

[Transcript of 3/16/76 (Case No. A-115-73 Cr.) at 46, 47]

"MR. WAGSTAFF: Your Honor, I can't represent to the

court — I can't assume responsibility to find an attorney.****"

"I know it is extremely difficult for someone in jail to find an attorney because it is extremely difficult to get an attorney to go over to jail to talk to someone."

[Transcript of 3/16/76 (Case No. A-115-73 Cr.) at 48]

"MR. WAGSTAFF: An additional comment I would like to make, your Honor, although Mr. Lustig apparently has assets, land, just speaking as an attorney in private practice, attorneys are reluctant to take an interest, even though it is secured in land, as collateral for a fee for the reason that if a hearing is coming up very quickly, which apparently one is, and also under the speedy trial rules, it's important to have some actual cash in order to pay the overhead and also to discharge other responsibilities that exist.***"

"So there is a problem with assets being sufficient to acquire an attorney. There has to be some liquid cash."

[Transcript of 4/27/76 (Case No. A-115-73 Cr.) at 3]

"MR. WEIDNER: Well, I understand that. I am simply concerned about the interference with Mr. Lustig's right to counsel due to the limited facilities at Sixth and C for consultation. It's almost impossible for me to really see the gentleman."

[Transcript of 4/27/76 (Case No. A-115-73 Cr.) at 5, 6]

"The difficulties that we are encountering, Your Honor, are the following: First of all, and this is reflected in these pleadings, there is currently a class action suit that has been filed against the correctional facilities at Sixth and C. Now this is the correctional facility that the Federal Government has a contract with for holding pre-trial detainees and some convicted prisoners.

One of the allegations in that class action suit is that

there is severely restricted access to counsel. Specifically, there is only one holding cell that has been denominated the conference room. That cell is not exclusively for conferences, but in addition, is used as the holding cell. And there are three co-defendants in the instant case that are incarcerated at Sixth and C, so I am having difficulty getting any privacy without competing with the other defense attorneys in the instant case, and, of course, there are other attorneys that want to see their clients. In addition, there is long waiting periods before I can get in, and there is restrictions on how long I can stay, i.e., specifically, ten o'clock.

Another serious difficulty that we are encountering is trying to contact witnesses, due to the conditions here in Alaska, that is, a number of the witnesses I am trying to contact in Mr Lustig's behalf, live in the Bush, or certainly rural communities, and don't have street addresses, street signs, easily identifiable landmarks to find these people."

[Transcript of 4/27/76 (Case No. A-115-73 Cr.) at 8]

"But the primary thing I am here for is to ask Your Honor to rectify the prejudice that is accruing to Mr. Lustig by display of — not simply custodial conditions, but custodial conditions *where he is literally being forced to walk in and out of the courtroom in the company of the co-defendants in a conspiracy trial. And I think it is highly prejudicial.*"

[Transcript of 4/27/76 (Case No. A-115-73 Cr.) at 17, 18]

"Now, the real issue here, or one of the main issues is the conditions at Sixth and C, the impossibility of conducting an effective defense while someone is incarcerated there. We are not arguing that every defendant has a right to be released during his trial. *I am trying to point out that one*

of the big problems here are the conditions at Sixth and C. The class action suit I referred to is Mosley, et al., versus Williamson and Wanaka, et cetera, and it has been, it has been supported by substantial case authority, particularly briefs filed in New Orleans, in Harris County situation, and California, as to the fact that the man has a right to effective assistance of counsel in pretrial incarceration."

[Transcript of 4/27/76 (Case No. A-115-73 Cr.) at 19, 20]

"Now he says that there are no other witnesses that are critical. Well, I don't know how well the prosecutor knows his case, but I have reason to believe, and I would represent to the Court, that there is a high likelihood that there were other witnesses to the arrest. And I am speaking now of the arrest when the bench warrant was served on Mr. Lustig pursuant to the secret Indictment. This is a critical, critical, critical, situation because the major evidence against Mr. Lustig at the trial, and the major evidence that I understand Your Honor relied upon with regard to any kind of factual findings that there might be a revocation, is the possession charge, possession of alleged cocaine at the time of the arrest. So it is quite critical that we find witnesses to that arrest. Not only is it important that we find these witnesses, but I have reason to believe that should we find these witnesses, that I need other witnesses that may have to actually impeach my own witness, but I think they are going to be hostile. But that's critical, and I am loathed to even reveal that much, since Mr. Lustig has Fifth Amendment rights. But I am trying to indicate to Your Honor the good faith of my allegations that I am looking for witnesses, and that's who I am looking for, in particular, are witnesses that are going to help us in defending against that possession at the time of arrest."

[Transcript of 3/26/76 (Case No. A-76-51 Cr.) at 11]

MR FULD: Your Honor, first on the withdrawal. I am not representing that it is that — well, that Mr. Lustig and myself — one of my partners could not reach agreement on my representing him. We have not done so at this point. And he tells me that in my memorandum where I said — does not say he does not want me to represent him, he wants the opportunity to consult other attorneys. My own feeling is at this time that I don't believe, and I think I made it clear in the other case in which I appeared on the probation revocation, that there could well — I can see developing a situation where it could be well impossible to effectively represent Mr. Lustig. I am not talking about any — I mean just in the limited time that I have been talking to him.

I don't want to say anything derogatory of Mr. Lustig. I just feel at this time, until I have more time to talk and see what the defenses are, I should advise the court it may be impossible for me to represent Mr. Lustig based on what he wants done and what I would want to do. I really — I don't think it — I think in my prior appearance I indicated — upon appearing for the bail reduction — I appeared for a lot of people in the last few weeks on these respective indictments and I think I made it clear it was for arraignment only and not in this case, but what I am saying, at some subsequent time we may reach an agreement to my representing him. But I think at this point Mr. Lustig would — I would like to help him in terms of bail, since there is no one else, I requested, or indicated that he wants to talk to other attorneys. I requested two very competent, or three very competent attorneys to go and see him. Apparently, no one has come there to see him. They promised —

THE DEFENDANT: No one has come over there.

MR. FULD: Your Honor, could Mr. Lustig say something?

THE COURT: Yes.

THE DEFENDANT: Your Honor, beginning a week ago, I have been making every attempt to speak to other attorneys, James Gilmore. I tried to get in touch with Mr. Boyko. First of all, I have to wait two or three days before I can make a telephone call. And in the jail there — and I asked other inmates to ask their attorneys to let me speak to them. I have had no success whatsoever in being able to talk to any attorney in a week of trying. That is why I want to be able to be allowed to be released, so I can speak to other attorneys and get one to represent me. 14/

"Q. Do you believe that your ability to prepare a defense and hire an attorney of your choice, or at least interview other attorneys besides myself and my partners is hampered by being in jail?

A. It certainly is. *I have been attempting for two weeks [sic] to contact various attorneys with virtually no success whatsoever.*

Q. There is a reluctance for attorneys to come down to jail to visit someone, is that what you have found?

A. So far none of them have come down.

Q. It's difficult to make phone calls?

A. It takes about three days to make a phone call when you put in an application." (E.A.)

**III. AFFIDAVIT OF DEFENDANT-APPELLANT FROM
APPENDIX TO PETITION FOR WRIT OF MANDAMUS
AS TO RIGHT TO COUNSEL, TO CALL WITNESSES,
AND TO INVESTIGATE.**

(D.C. Alaska A76-51 Cr.)

(C.A.9th 76-1919)

Phillip P. Weidner
900 West Fifth Avenue
Anchorage, Alaska 99501

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

GEORGE LUSTIG,

Petitioner,

vs.

**THE HONORABLE JAMES A. VON
DER HEYDT, UNITED STATES
DISTRICT COURT JUDGE FOR THE
DISTRICT OF ALASKA, UNITED
STATES OF AMERICA, GREGORY
D. PEDERSON and CHERYL RAE
SMITH a/k/a SHERRI L.
PEDERSON,**

Respondents.

File No. _____
(Cause No. A-76-51 Cr. in the
United States District Court
for the District of Alaska)

AFFIDAVIT

STATE OF ALASKA

ss.

THIRD JUDICIAL DISTRICT

GEORGE LUSTIG, being first duly sworn on oath, deposes
and says:

I wish to address myself to two issues here. The first pertains to my efforts to secure counsel of my choice and need to prepare adequately for my upcoming trial scheduled to begin on the 26th of April. Since the beginning of my incarceration approximately six weeks ago I have done all within my power to communicate with attorneys willing to undertake the necessary preparation of my defense. It has never been by intention to have William Fuld try my case, nor has it been his intention to prepare by defense at trial. It was understood between us since the beginning that Wendel Kay would be my attorney at my trial. It became apparent approximately three weeks ago that because of Mr. Kay's other legal commitments at the time my trial was scheduled to begin and further complicated by health considerations that he would not be able to undertake my defense at that time. Despite this situation a continuance was denied which would have enable him to undertake my case. Despite constant efforts every day on my part to be allowed to make phone calls, and despite a court order to the effect that I was to receive special consideration in this regard, permission was denied me by jail officials for over a week to contact other attorneys who might be willing to undertake my case, which in my opinion requires extensive preparation including a private investigator to conduct extensive investigation into the circumstances which lead directly to the indictments I am currently charged with.

Finally, on the 17th of April (Saturday) I was granted per-

mission to make a phone call at which time I called a friend (John Grimes) and asked him to contact Bob Wagstaff and Phillip Weidner, both of whom contacted me on Monday the 19th. Weidner came to see me personally and wagstaff contacted me by phone. For over a week prior to this time William Fuld had not been in touch with me at all except to drop a folder off at the front desk on Friday the 16th containing a motion he had submitted as well as some answers to prior motions and a contract for me to sign designating him as my attorney and also containing fee agreements and a handwritten request on the outside of the folder asking me to "write out my defense" and also saying that he would call on me in person in the next few days. He come to see me personally the following Sunday the 18th at which time I reiterated my contention that I had no intention of having him represent me in my upcoming trial in lieu of Mr. Kay and advising him of my concern that none of the preparation for trial or the investigation which I felt were necessary had been conducted. I also told him at this time that I was attempting to secure the services of another attorney. Mr. Weidner had come highly recommended to me by Mr. Wagstaff as well as Michael Rubinstein and Martin Friedman. After spekaing with him at length on the 19th I became very interested in having him represent in my fast approaching trial, but at that time he could not definitely commit himself because of his current employment with the Public Defender Agency, plus a full caseload as well as various other considerations not the least of which was the impossibly short time in which to prepare adequately in the event of a continuance not being granted.

Mr. Weidner, with considerable effort managed to arrange his affairs the next day (the 20th) and was able to commit himself to trying my case. During the next two days he put

tremendous effort into preparing motions and undertaking to study and understand the comples ramifications of the case. Two days later, on the 22nd, after a great deal of study and hard work on Mr. Weidner's part, Mr. Weidner and I appeared before Judge von der Heydt, who peremptorily dismissed my efforts to secure counsel and Mr. Weidner's sincere efforts to effectively represent me as an attempt to "whipsaw the court" and summarily denied every motion as if we had conspired in some sort of flippant effort to thwart the cause of justice. He then declared that hearing at an end and left without hearing any explanation from me and but a very few remarks from my attorney. I would now contend that this violates my constitutional right to a fair trail because of circumstances beyond my control and places my attorney despite his sincere efforts to prepare my defense at a severe disadvantage.

The second issue I would raise at this time, and one which has a direct bearing on all the matters herein discussed, is the fact that I was not given a fair bail to begin with; and when I made efforts to raise it, it was lifted altogether, without basis, and for reasons in no way established in fact or justified in any way thereby denying another of my constitutional rights and consequently substantially contributing to my present dilemma in regard to adequately preparing for trial and securing counsel in a timely fashion.

In sum I have been denied my constitutional rights to counsel, pre-trial investigation, and right to call witnesses in my behalf due to no fault of my own and a cavalier treatment in the court.

Further affiant sayeth naught.

/s/

George Lustig

SUBSCRIBED and SWORN to before me this _____ day
of April, 1976.

/s/ _____

Notary Public in and for Alaska
My Commission Expires: _____

**IV. EXHIBIT RELATING TO LACK OF TRIAL
PREPARATION [Exhibit from Appendix to Appeal from
Conditions of Release (D.C. Alaska A-115-73 Cr.) (C.A.
9th No. 76-1925) and Petition for Writ of Mandamus (D.C.
Alaska A-76-51 Cr.) (C.A. 9th 76-1919)]**

TO LORGE LUSTIG

TRIAL PREPARATION

WRITE DOWN
the defense

NAMES of witnesses

I'll be in to
see you this
weekend

Bill —

Return these
to me —

**V. AFFIDAVIT OF DEFENSE COUNSEL IN SUPPORT OF
REQUEST FOR CONTINUANCE TO PREPARE [R.-235;
C.A. 9th 76-2661] [R.-60; C.A. 9th 76-3146]**

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ALASKA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE H. LUSTIG, et al.,

Defendants.

Cause No. A-76-51 Cr.

AFFIDAVIT OF COUNSEL

STATE OF ALASKA)

) ss.

THIRD JUDICIAL DISTRICT)

I, PHILLIP P. WEIDNER, being first duly sworn upon his oath, deposes and says:

1. That I am currently employed as an Assistant Public Defender for the State of Alaska.

2. I was contacted on or about Saturday, April , 1976, by

Martin Freidman, indicating that I should contact George Lustig at the State Correctional Facility at 6th Avenue and "C" Street, since he was having difficulties securing an attorney to represent him in the instant case and wanted to see me.

3. Prior to contacting Mr. Lustig I felt bound to contact Robert Wagstaff through Mr. Freidman and Mr. William Fuld personally, in order to ascertain whether there would be any objections by attorneys who I felt might possibly be Mr. Lustig's attorney.

4. I first saw Mr. Lustig on Monday, April 19, 1976, in the late afternoon.

5. The interim time period since has been consumed by attempts to ascertain as to whether I can reach a fair agreement with Mr. Lustig, and whether I can sever my employment relationship with the Alaska Public Defender Agency on short notice.

6. I currently am carrying a full appellate case load in the Alaska Public Defender Agency in addition to various commitments with regard to appearances in Superior Court for the State of Alaska in felony matters.

7. I am prohibited by statute from accepting the instant case from Mr. Lustig unless I resign my position with the Alaska Public Defender Agency.

8. I am submitting today my resignation to said agency. (Effective 9:00 a.m., 4/21/76 should this court grant substitution).

9. From the knowledge of the case I have thus far it appears essential to effective assistance of counsel to hire an investigator forthwith relative to certain witnesses for the government, and relative to certain persons who might have had occasion or motive to conspire to seek arrest and conviction of Mr. Lustig.

10. Mr. Lustig has indicated to me distinctly that I am his attorney of choice relative to these charges.

11. The defendant's motion for continuance is made in good faith and not for purposes of delay.

12. I have spoken with Mr. Lustig and he will waive any rights to speedy trial he has for the said sixty (60) day period in order to gain effective assistance of counsel of his choice.

13. It is my opinion as an experienced defense attorney that should Mr. Lustig be forced to trial on Monday, April 26, 1976, *the short time in which I have had to prepare the case will effect Mr. Lustig's rights to confrontation, cross-examination, rights to call witnesses, rights to a fair and impartial jury, and rights to effective assistance of counsel of his choice.*

14. As the attorney of Mr. Lustig's choice it is my sincere desire to discuss with him fully any alternatives he might have with regard to reaching a disposition of the instant proceedings short of trial, and further to ensure that a meritorious sanity defense has not been neglected due to the lack of opportunity of Mr. Lustig to secure the attorney of his choice.

DATED at Anchorage, Alaska, this 21st day of April, 1976.

/s/

PHILLIP P. WEIDNER

SUBSCRIBED AND SWORN to before me this 21st day of April, 1976.

/s/

Notary Public in and for Alaska
My commission expires: 6/25/78

**VI. AFFIDAVIT OF WILLIAM FULD AS TO CONFLICT
WITH DEFENDANT LUSTIG [R-66; C.A. 9th 76-2661]
IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF ALASKA**

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

GEORGE H. LUSTIG; GREGORY D.
PEDERSON; CHERYL RAE SMITH
a/k/a SHERRI L. PEDERSON.)

Defendants.)

No. A76-51

AFFIDAVIT OF COUNSEL

STATE OF ALASKA)

) ss.

THIRD JUDICIAL DISTRICT)

WILLIAM H. FULD, being first duly sworn upon oath, deposes and says:

THAT I have been ordered by the Court to represent GEORGE LUSTIG although he and I have never entered into any agreement that I would represent him at the trial. After consulting further with Mr. Lustig, *I find it necessary to hire an investigator to investigate the background of the alleged confidential informers who may be witnesses against him and who may have conspired with unknown persons between September of 1975 and the date of Mr. Lustig's arrest to have him charged and convicted of sale of narcotic drugs with which he was never involved.* To carry on the proper investigation requires money

and time. As the attached order of Judge Plummer indicates, Mr. Lustig does not have funds available to hire an attorney, much less an investigator. Since Mr. Lustig has not been released from confinement due to the government's having Mr. Lustig arrested as he was about to be bailed out on the present indictment, it is impossible for me to effectively represent Mr. Lustig in this short time allotted.

As is typical of many attorneys, I have numerous other matters on my calendar and had refrained from entering an appearance for Mr. Lustig out of fear I could not effectively represent him in that short period of time and knowing that he would not be able to raise funds or obtain representation. If Mr. Lustig is given a sixty day continuance, he should be able to raise sufficient funds to hire an investigator by either liquidating trust funds which he is trying to do and by selling real estate.

It is Mr. Lustig's desire to have Mr. Kay represent him at the trial of this case. Mr. Kay is scheduled to be in trial in Fairbanks in the case of *USA v. Samuel Jeffcoat, et al.* commencing April 20th in Fairbanks. It is doubtful if that trial will be completed in time for Mr. Kay to return and participate in the trial of Mr. Lustig scheduled to start April 26th.

Since I have myself prior commitments, including a Supreme Court Brief due April 9th, a Supreme Court Argument on April 19th, a complicated civil case set for April 19th in State Court, and approximately eight other matters, including two misdemeanor trials between now and April 26th, I certainly can not devote to Mr. Lustig's defense that is necessary.

A recent newspaper article which appeared in the Anchorage Times on March 27th, is further grounds for either a delay of this trial so that it's impact will not be as fresh in the minds of the jurors or a change in place of trial. *The newspaper article attached to this affidavit as exhibit "A"*, indicates a number of

prejudicial matters which could well be in the minds of jurors and would deny him a fair jury panel. *The items mentioned in the newspaper which are prejudicial and otherwise inadmissible are (1) that he was convicted previously on charges of smuggling hashish here; (2) that he faces revocation of probation; (3) that he had cocaine worth \$30,000.00; (4) that his present attorney wants out of the case.*

Present defense counsel also believes that it may be necessary to present psychiatric testimony and full psychiatric evaluation can not be accomplished in three weeks.

FURTHER, YOUR AFFIANT SAYETH NAUGHT.

/s/

WILLIAM FULD

SUBSCRIBED AND SWORN TO before me this 6th day of April, 1976.

/s/

Notary Public

VII. EXHIBIT RELATING TO DIFFICULTY IN OBTAINING COUNSEL [R.-338; C.A. 9th 76-2661] [Appendix to Appeal from Conditions of Release (D.C. Alaska A-115-73 Cr.) (C.A. 9th No. 76-1925), and Petition For Writ of Mandamus (D.C. Alaska A-76-51 Cr.) (C.A. 9th 76-1919)]

Judge Refuses To Lower Bail

By MORGAN PARKER
Times Staff Writer

U.S. District Judge Raymond E. Plummer yesterday refused to lower the \$50,000 bail set for George H. Lustig of Wasilla, who stands accused with two others in a federal indictment alleging they had sold cocaine.

The lengthy bail review hearing followed the lowering of Lustig's initially set bail last week from \$100,000 to \$50,000.

Plummer said Lustig will stay in jail as a "danger to the community."

The bearded Wasilla homesteader was convicted previously on charges of smuggling hashish here and faces revocation of his probation on that case in connection with the charges in the federal indictment.

A hearing on the probation revocation petition is set for 10:30 a.m. Friday. It is based on charges that Lustig was arrested for the cocaine sales charges and apparently "was trying to hide" under the police car seat a bag containing

"cocaine with a street value of \$30,000," said U.S. Attorney G. Kent Edwards.

Lustig's trial for charges in the indictment is set for late April.

He sought the bail reduction — despite his ownership of an estimated \$200,000 in land in Anchorage and the Matanuska valley plus a \$10,000 trust — saying he doesn't have ready cash and can't get a lawyer while in jail "because they won't come there."

His present attorney, William Fuld, wants out of the case.

Fuld says he disagrees with Lustig about the type of defense which should be launched. Lustig's first conviction took four years.

The defendant took the stand to explain his situation and was aggressively cross-examined by Edwards.

During that cross-questioning, Lustig admitted he left the state against probation rules last September to find his estranged spouse in Vermont. Also, Edwards forced Lustig to evoke the fifth amendment when the prosecutor asked, "Where, then, did you get the money for the cocaine you had when you were arrested?" during the examination of Lustig's finances.

Plummer said he won't approve postponements of hearings in the case because Lustig said he couldn't find counsel. The jurist, in an unusual gesture, asked Attorney Robert Wagstaff in the audience if he could represent Lustig or find someone who could. He apparently wanted to thwart delays of this case against Lustig.

This case, he said, will continue on schedule.

(See Page 2, Col. 8)

Judge Nixes Bail Plea

(Continued From Page 1)
At the bail hearing the government will try to prove Lustig possessed cocaine on his arrest on the indictment. It was later amended by Edwards to include that post-arrest charge.

Also named in the indictment are Gregory D. Pederson and Cheryl Rae Smith, also known as Sherri L. Pederson.

Count one charges Lustig with distributing to Pederson about 25 grams of the so-called "queen of drugs" on Feb. 27. Count two says Pederson sold that 25 grams to someone else the same day.

The third charge claims the Pederson couple distributed about 22.4 grams of the drug also on Feb. 27. Also charged is that the trio conspired to make the alleged "controlled substances" transactions.

Two additional counts charge that Lustig possessed 55 grams of the drug March 10 when he was arrested and had a "small vial" containing about 317 milligrams of 100 per cent pure cocaine.

The charges against the trio are connected with a recent series of drug arrests made here by federal agents of some 15 people in the Anchorage area.

Trials of all the cases are set to start late next month.

VIII. AFFIDAVIT OF DEFENSE COUNSEL AS TO INABILITY TO CONSULT OR LOCATE WITNESSES AND INVESTIGATE [R.-365; C.A. 9th 76-2661] [R.-63; C.A. 9th 76-3146]

Mr. Phillip P. Weidner
900 West Fifth Avenue
Anchorage, Alaska 99501

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

VS.

GEORGE LUSTIG, et al.,

Defendants.

STATE OF ALASKA

THIRD JUDICIAL DISTRICT

Cause No. A-115-73

AFFIDAVIT IN SUPPORT OF MOTION FOR MODIFICATION OR MOTION TO SET BAIL

COMES NOW the affiant, PHILLIP P. WEIDNER, and first being duly sworn, deposes and says:

1. I am the attorney of record for Mr. George Lustig in the trial of this matter.

2. As reflected by the attached affidavit of motion for con-

A6

BEST COPY AVAILABLE

tinuance, Mr. Lustig has been experiencing considerable difficulties in obtaining counsel of his choice, and further, I have had only minimal opportunity to conduct pre-trial investigations in these proceedings.

3. Due to the state of the correctional facilities at 6th Avenue and C Street, Anchorage, Alaska, it is often difficult or impossible to conduct private communications with clients without substantial waiting periods (half an hour to an hour and one-half).

4. Due to the current facilities it is often necessary to wait substantial periods before even seeing clients.

5. There is currently filed in the state courts, a class action suit against those officials charged with maintaining the facilities at 6th Avenue and C Street.

6. One of the causes of action in the said suit is the allegation that the current facilities, and the current practices with regard to phone calls and messages, violate pre-trial detainees' right to effective assistance of counsel of choice.

7. After speaking with Mr. Lustig it appears that it will be necessary to his constitutional rights to call witnesses, constitutional rights to confrontation and cross-examination, and constitutional rights to effective assistance of counsel, that numerous witnesses be contacted and interviewed by the defense.

8. A number of the aforementioned witnesses live in rural portions of Alaska, such that their location will be difficult, if not impossible, to determine on short notice, unless Mr. Lustig was free to assist myself or my defense investigator in locating said witnesses.

9. It appears necessary to effective assistance of counsel for Mr. Lustig to accompany me to view the scene of some of the alleged transactions in the instant proceedings, and for Mr.

Lustig to accompany me to view the scene of the arrest in the instant proceeding.

10. Due to the nature of the charges, and the complexity in the instant proceeding, it appears necessary for reasonable effective assistance of counsel for me to conduct lengthy personal discussions with the defendant during the course of these proceedings.

11. The current facilities at 6th Avenue and C Street now have a curfew of 10:00 p.m. with regard to attorney visits.

12. There are three co-defendants in the instant case, and to my knowledge, at least one of the co-defendants, Gregory Pederson, is lodged at the 6th Avenue and C Street facility, such that both Mr. Pederson's counsel and myself will be competing for the only holding cell that has been nominated a conference room in the correctional facilities at 6th Avenue and C Street.

13. Due to physical structure at the facilities at 6th Avenue and C Street, there is a substantial likelihood that should I be forced to conduct confidential communications with my client during the course of these proceedings at the facility, that passing guards, prisoners, co-defendants, co-defense counsel, agents of the federal and state governments (Troopers, City Policemen, federal marshals) may overhear portions of my conversations in the hall at 6th Avenue and C Street.

FURTHER AFFIANT SAYETH NAUGHT.

DATED at Anchorage, Alaska, this 23rd day of April, 1976.

/s/

PHILLIP P. WEIDNER

SUBSCRIBED AND SWORN to before me this 23rd day of April, 1976.

/s/

Notary Public in and for Alaska
My commission expires: 6/25/78

**IX. AFFIDAVIT OF DEFENSE COUNSEL AS TO EFFECTS
OF ORDER FREEZING ASSETS [R.-123; C.A. 9th
76-3146]**

Phillip P. Weidner
900 West Fifth Avenue
Anchorage, Alaska 99501
907-276-7000

Attorney for the Defendant

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ALASKA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE H. LUSTIG,

Defendant.

STATE OF ALASKA

THIRD JUDICIAL DISTRICT

Cause No. A-115-73 Cr.

AFFIDAVIT OF COUNSEL

PHILLIP P. WEIDNER, being first duly sworn upon oath,
deposes and says:

1. That I am the attorney of record for the defendant,
George H. Lustig;

2. That all of Mr. Lustig's personal immediate cash assets to
my knowledge have been exhausted in satisfying child support,

certain expenses of investigation, transcripts, witness fees,
psychiatric evaluation, real estate taxes, transcript and record
expenses, and/or other court fees and expenses as regards to trial
and appeal in Cause No. A76-51 Cr. and the instant proceeding;

3. That while I and Mr. Lustig have a formal written agree-
ment concerning the attorney/client relationship, and fees for
legal representation, I have not personally kept any cash funds
for satisfaction of said fee;

4. That it is my desire and the desire of Mr. Lustig that
restraints on alienation of certain portions of his real property
be lifted such that we may begin attempting to liquidate some
portion of said real property to satisfy said legal fee, and
further, to make reasonable offers of settlement as regards civil
litigation now pending against Mr. Lustig in the state courts of
the State of Alaska regarding claims against Mr. Lustig as to
child support and/or a purported division of property as regards
his "common law" spouse, Callie Newton, a/k/a Callie Vander-
laan, in Case No. 76-4808;

5. Mr. Lustig's immediate cash assets are such at the present
time that I would have to advance him cash for certain appel-
late expenses and/or travel should this court not release his
property for partial liquidation;

6. Mr. Lustig may suffer irreparable harm and injury to his
real property assets should they be frozen indefinitely without
an adequate opportunity to protect said assets by partial
liquidation due to Mr. Lustig's anticipated lengthy incarcera-
tion, and present actual incarceration;

7. That the instant motion is made in good faith and not for
purposes of delay.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED at Anchorage, Alaska, this 21st day of September,
1976.

/s/

PHILLIP P. WEIDNER
Attorney for Defendant

SUBSCRIBED AND SWORN to before me this 21st day of
September, 1976.

/s/

Notary Public in and for Alaska
My commission expires: 6/25/78

**X. OFFER OF PROOF RELATIVE TO SEARCH [R.-371; C.A.
9th 76-2661]**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

UNITED STATES OF AMERICA,)
Plaintiff,)

vs.)

) Cause No. A76-51 Cr.

GEORGE H. LUSTIG et al.)
Defendant,)

Offer Of Proof

NOW COMES the Defendant George H. Lustig by and through his attorney Phillip Weidner and makes the following offer of proof to this court for purposes of appeal, that if an evidentiary hearing were granted the facts would establish the following:

1) That the February 27th search and seizure of vehicle allegedly driven by the defendant was made XXX after the defendant had been removed from the vehicle and searched by police, and that the defendant was not in the proximate area of the vehicle.

2) That there are insufficient facts to establish a finding of probable cause to search and seize the vehicle.

3) That it was not the desire of the defendant to have the vehicle impounded nor did he consent to have the vehicle impounded and further he was given no option.

4) That the vehicle was pulled over onto the side of the road and not interfering with traffic, and further that should it have been necessary arrangements could have been made to move the vehicle.

5) That there was no contraband in plain view and no evidence in plain view.

6) That under the circumstances of this case and local law the police lacked authority to impound the vehicle.

By: /s/
Phillip P. Weidner

**XI. TESTIMONY ON TRUCK SEARCH AND REMOVAL OF
PARCEL TO STATION FOR FURTHER SEARCH
[Transcript of 5/5/76 (Case No. A76-51 Cr.) at
1345-1348] (C.A. 9th 76-2661)**

Q: (Pause) Sir, when you arrested Mr. Lustig that night, did he make any request to have his car towed away by a friend of his?

A: Yes, I believe he did.

Q: And would these be the gentlemen who arrived in the boom truck?

A: Yes.

Q: Was he adamant about it?

A: Not adamant.

Q: Pretty vocal about it?

A: He stated several times he would prefer to have it. Now —
(Original transcript double spaced).

**XII. OFFER OF PROOF ON DEFENSE WITNESSES AND
CONTINUANCE**

(R-505)

AFFIDAVIT

STATE OF ALASKA

)
) ss.

THIRD JUDICIAL DISTRICT

)

PHYLLIS REZNEK, being first duly sworn upon oath,
deposes and says:

The affiant was available at the office of Gregg, Fraties, Petersen, Page & Baxter, 720 M Street, Anchorage, Alaska, at 2:30 p.m. on May 11, 1976 to be served a subpoena to testify as a witness in the case of *United States v. George Lustig, et. al.*, Criminal No. A76-51, and the affiant was willing to testify if called. The affiant traveled from Juneau, Alaska to Anchorage, Alaska on the morning of May 11, 1976.

/s/

PHYLLIS REZNEK

SUBSCRIBED AND SWORN to before me this 11th day of
May, 1976.

/s/

Notary Public in and for Alaska
My Commission expires: 11/22/79

[Transcript of 5/11/76 (Case No. A-76-51 Cr.) at 2027] (C.A. 9th 76-2661)

"MR. WEIDNER: Where? I would like to know where. With regard to us trying to put a subpoena out, we have been trying to locate the woman since the start of this trial.

THE COURT: I know, counsel, but you can subpoena her from the beginning, or long before the trial.

MR. WEIDNER: *I want to point out, your Honor, there was the right to counsel and a reasonable continuance at the start of the trial for locating witnesses. I informed the Court at that time, of the difficulty.* This man was in jail since he was arrested, and he had difficulty contacting counsel.

MR. EDWARDS: He said that he did not try until Friday, to locate her.

MR. WEIDNER: That is not so. I tried to issue a subpoena at that time."

XIII. TRANSCRIPT REFERENCES ON CONFRONTATION BY MR. WEIDNER:

Q: So you say you have no actual or potential criminal charges pending against you. Did you give Mr. Morgan any heroin before he killed Mr. Flora?

THE COURT: Objection, Your Honor. (Sic.)

THE COURT: Sustained.

* * *

(Jury Excused)

MR. WEIDNER: I asked him if he gave Mr. Morgan heroin before Mr. Morgan killed Mr. Flora, and I can make an offer of proof, and I know he did.

THE COURT: And what is the relevance?

MR. WEIDNER: The relevance is that I think the police know it and it is over his head and that's why he is working for them.

THE COURT: If you want this witness to testify to anything to do with this case you had better get to the issues or he is leaving the stand. I am telling you that now. If you ask one more question like that, he is leaving the stand. I am telling you this, and I am warning you and I will admonish you in front of the jury if you do that once more, and he is leaving the stand. He is here, I presume, to testify as to the issues involved in this case and nothing more. If you do not question him concerning those, he will leave the stand. Is this understood?

MR. WEIDNER: Yes. I would like to make a formal offer of proof as to why I asked the question.

THE COURT: I know why you asked the question and it is obvious on the record.

MR. WEIDNER: No, it isn't, and I want to —

* * *

THE COURT: You haven't asked him. He may deny it.

MR. WEIDNER: He may, but I want to show that the man has a motive and bias before I start asking him these questions. That's a proper question, and all I am asking is —

THE COURT: Don't argue with the court. I have ruled. If you pursue this line of questioning he will leave the stand.

The jury may be recalled.

Now question him concerning the issues in this case. If you do it once more he will leave the stand, like you just did when I sent the jury out. If you do it once more he will leave the stand. I have said it four times and it should be clear.

(The jury is present)

* * *

BY MR. WEIDNER:

Q: Do you know Mr. Morgan?

A: Pardon?

MR. EDWARDS: Objection, Your Honor, it's beyond the scope and is irrelevant.

THE COURT: Sustained.

* * *

(Bench Conference)

MR. WEIDNER: Your Honor, there is one question I would like to ask. Your Honor, there is not just a conviction pending but possible charges and as to the motive for bias and any pending possible charges. I want to find out if he got arrested at the Mexican Border and I want to find out whether Morgan was selling dope and the police know that night he killed Flora and with reference to the gun, and I know the only reason he has to get these people — I have good reason to believe —

THE COURT: Well, it seems that Morgan killed Officer Flora and that he did so during a burglary.

MR. EDWARDS: What date?

THE COURT: It was prior to — it was in the newspapers a year ago, a year and a half ago. Well, I won't permit it, permit the question.

MR. WEIDNER: The question I would like to ask out of the present of the jury is —

THE COURT: I have ruled, counsel. You may not ask it.

(Back in open court)

* * *

MR. WEIDNER: Yes, Your Honor. In regard to my previous offer of proof with regard to this witness, I would like to file Hutchings versus the State at this time. I have a copy for all counsel. I believe it is pertinent as to the offer I made with regard to potential bribes, specifically about any acts he might be prosecuted for.

BY MR. WEIDNER:

Q: Did you know Mr. Morgan?

MR. EDWARDS: Objection, your Honor.

* * *

THE COURT: Yes, it is not within the purview of the direct.

MR. WEIDNER: I just want to ask this question. I am not suggesting any possible questions.

THE COURT: What was the question?

MR. WEIDNER: Do you know Mr. Morgan?

MR. EDWARDS: This was the matter that caused some long discussions the other day to which there was objection.

THE COURT: Well, without anything further, it is sustained. I don't know that there is — there is nothing to base any thought of relevancy on at all.

BY MR. WEIDNER:

Q: Might I just simply ask you this, sir, if the police knew of your activity with Mr. Morgan, would you be concerned?

MR. EDWARDS: Objection, your Honor. He has been directed to stay away from this line of questioning.

THE COURT: Sustained. The jury will disregard the question and draw no inference from it.

(Original transcript double spaced).

(Tr. 1514, 1518, 1791-1792, 1805; (A76-51 Cr.)

(C.A. 9th 76-2661)]

**XIV. OFFER OF PROOF ON EFFECTS OF FAILURE TO
GRANT INDIVIDUAL JURY POLL AS TO EACH
COUNT**

Phillip P. Weidner
425 G Street, Suite 520
Anchorage, Alaska 99501

[R.-583; C.A. 9th 76-2661]

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ALASKA**

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

Case No. A-76-51 Cr.)

GEORGE H. LUSTIG, et al.,)

Defendants.)

**AFFIDAVIT OF
COUNSEL**

STATE OF ALASKA)

) ss.

THIRD JUDICIAL DISTRICT)

PHILLIP P. WEIDNER, being first duly sworn upon oath,
deposes and says:

1. That I am the attorney of record in the instant proceedings.
2. As reflected by the attached pleadings, it is my desire to preserve the testimony of the jurors impanelled in the instant case relative to the effect of the failure to grant an individual poll as to each count, and as to whether the verdict was unanimous.

3. Further, it is my desire to do such immediately so that the passage of time will not do irreparable damage to defendant's right to a clear record as to the effect of said poll, and as to whether the verdict was unanimous.

4. I have numerous other matters demanding my attention, including but not limited to jury trial June 7, 1976, in *State of Alaska vs. Williams* matter, appearance in Fairbanks the week of May 24, 1976, and a motion to withdraw a plea to first degree murder in the *State of Alaska vs. Morgan* matter, judge trial in the state court *In The Matter of the Custody of Matthew Link*, starting May 20, 1976, jury trial in a first degree murder case in the matter of *State of Alaska vs. Leroy Gieffels* starting July 19, 1976, several matters to be argued before the Alaska Supreme Court, jury trial in the matter of *United States vs. Sterling Modell Jackson*, now set for June 28, 1976.

5. As reflected by the attached affidavit I have good reason to rely on persons informing me that at least one of the jurors in the instant proceeding has stated that the verdict was not unanimous, and further that the failure of said juror to so indicate in open court was due to the denial of the defendant Lustig's request for an individual poll as to each count.

DATED at Anchorage, Alaska, this 19th day of May, 1976.

/s/

PHILLIP P. WEIDNER

SUBSCRIBED AND SWORN to before me this 19th day of
May, 1976.

/s/

Notary Public in and for Alaska
My commission expires: 4/25/79

[R.-625; C.A. 9th 76-2661]

Phillip P. Weidner
425 G Street, Suite 520
Anchorage, Alaska 99501

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

Case No. A-76-51 Cr.)

GEORGE H. LUSTIG, et al.,)

Defendant.)

AFFIDAVIT OF
COUNSEL)

STATE OF ALASKA)

) ss.

THIRD JUDICIAL DISTRICT)

PHILLIP P. WEIDNER, being first duly sworn upon oath,
deposes and says:

1. I am the attorney of record for George H. Lustig in Case
No. A-76-51 Cr.

2. At the return of the verdict against Mr. Lustig I was aware
of non-verbal conduct by at least one juror indicating to me
severe manifestations of emotional distress.

3. At the return of said verdict I specifically requested a poll
of each juror as to each count against Mr. Lustig, since Mr.
Lustig had taken the stand and essentially admitted the ele-
ments of the crime of possession of a controlled substance,
which was one of the counts against Mr. Lustig.

4. I further requested said poll since I wanted to protect Mr.

Lustig's constitutional and statutory rights to inquire of each
juror individually as to each separate count.

5. On Friday, May 14, 1976, I inadvertantly was informed
that one of the jurors had spoken to another person indicating
that the verdict or verdicts against Mr. Lustig were not unani-
mous. Further, I was informed that said juror had indicated
that said juror had expressed in the jury room the view that her
mind was undecided as to whether Mr. Lustig was proven
guilty beyond a reasonable doubt.

6. I was further informed that said juror had stated that she
was informed by the majority jurors that the fact that she was
undecided did not matter, but that a verdict had to be reached
in order for them to leave.

7. I was further informed that said juror had stated that she
wished to express this dissent at the poll of the jury, and was
further waiting for the poll with regard to Mr. Lustig, and
further was forced to abandon her attempt to express this
dissent when the Honorable James A. von der Heydt ruled
against my request for an individual poll.

8. I have not personally contacted said juror out of respect
for this court's discretion with respect to contacting jurors who
are still subject to jury duty.

9. The exact status of my information at the present time is
that a person whom I have had occasion to rely on numerous
times has informed me of a conversation with a person pur-
portedly to be a close personal friend of said juror as to these
events.

10. In order to protect Mr. Lustig's constitutional rights to a
unanimous verdict, and further his rights on appeal, it is my
desire to either interview said juror forthwith, to take the
deposition of said juror forthwith, or take the testimony of said
juror in open court in order that a true and fair record can be

made with regard to the effect of the denial of an individual poll as to each count.

11. The attached motions for a new trial, motions for interview or deposition, are made in good faith and not for the purpose of delay.

DATED at Anchorage, Alaska, this 19th day of May, 1976.

/s/

PHILLIP P. WEIDNER

SUBSCRIBED AND SWORN to before me this 19th day of May, 1976.

/s/

Notary Public in and for Alaska
My commission expires: 4/25/79

**APPENDIX E – RELEVANT MOTIONS AND ORDERS
PRESERVING ISSUES FOR REVIEW
I. MOTION TO HOLD DEFENDANT WITHOUT BAIL AND
ORDER DENYING ANY BOND
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

GEORGE LUSTIG,

Defendant.

Crim. No. A-115-73

**MOTION TO HOLD DEFENDANT
WITHOUT BAIL PENDING
HEARING ON REVOCATION OF PROBATION**

COMES NOW the United States of America, by G. Kent Edwards, United States Attorney for the District of Alaska, and moves this Honorable Court that the defendant GEORGE LUSTIG be held without bail pending hearing on revocation of probation. This motion is based on the reasons set forth in the attached memorandum.

DATED this 2nd day of April, 1976, at Anchorage, Alaska.

/s/

G. KENT EDWARDS
United States Attorney

[R-47; C.A. 9th 76-3146]

ORDER

For the reasons set forth in the government's memorandum in support of motion to hold defendant without bail pending hearing on revocation of probation, as well as those previously noted by the Court in its bail review check list filed March 26, 1976,

IT IS HEREBY ORDERED that George Lustig be held without bond pending hearing on the petition to revoke his probation in Cause No. A-115-73 Criminal.

DATED this 2nd day of April, 1976, at Anchorage, Alaska.

/s/

RAYMOND E. PLUMMER
U.S. District Court Judge

**II. PORTIONS OF PRELIMINARY HEARING MINUTES
RELATING TO DENIAL OF BAIL**

PRELIMINARY HEARING
April 2, 1976
A-115-73 CR
USA vs George Lustig

* * * *

ORDER

It is hereby ordered that the Order entered on March 16, 1976 setting bail in this case in the amount of \$50,000.00 cash or corporate surety, is hereby vacated and set aside and it is now and hereby ordered that the defendant be held without bail pending the final hearing on the government's petition for revocation of probation.

Court adjourned at 4:40 p.m.

cc: U.S. Attorney

U.S. Marshal

U.S. Probation Officer

Kermit E. Barker

[R.-45; C.A. 9th 76-3146]

III. ORDER FREEZING ASSETS

**MINUTES OF THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA**

UNITED STATES OF AMERICA, v. GEORGE LUSTIG

No. A-115-73 CR

THE HONORABLE RAYMOND E. PLUMMER,
U.S. DISTRICT JUDGE

Deputy Clerk

Reporter

_____ Jim Meyers

_____ Dolores Runner

_____ Jeri Whitaker

_____ X Mary Krogstad

_____ Jan Nelson

_____ Sandra Shorey

APPEARANCES: Plaintiff: U.S. Attorney G. Kent Edwards.
At 11:03 A.M.

Court convened. Defendant: Present in custody represented by
William H. Fuld (Retn'd)

PROCEEDINGS: HEARING ON BAIL REVIEW AND TO
DETERMINE STATUS OF DEFENDANT'S
LEGAL REPRESENTATION

Arguments of counsel heard.

M.O. In addition to terms and conditions, heretofore imposed by the Court in lieu of committing Mr. Lustig after conviction without bail, it is ordered that Mr. Lustig is restrained and enjoined from transferring, conveying, or otherwise encumbering his real personal or mixed property without written permission of this Court until the pending petition for revocation of Probation has been heard and determined; provided however, with the written approval of the Court the assets of the defendant above mentioned may be pledged or otherwise encumbered to guarantee the payment of attorney fees or costs or expenses that may be incurred in preparation of defendant's case in an amount to be approved by the Court in writing.

Statements of counsel heard re hearing on petition for revocation of probation.

Statement of Robert H. Wagstaff, an attorney who was in the audience, re counsel for defendant. Mr. Wagstaff asked by the Court to report no later than Monday morning, April 29, 1976 re progress being made in obtaining counsel for Mr. Lustig.

Hearing on petition for revocation of probation to be held Friday, April 2, 1976 at 10:30 A.M. as previously set by the Court's written order of March 25, 1976.

At 12:57 P.M. court adjourned.

DATE: March 26, 1976 INITIALS /s/
Deputy Clerk

cc: U.S. Attorney G. Kent Edwards
William H. Fuld, Esq.

[R.-28; C.A. 9th 76-3146]

IV. MOTION FOR CONTINUANCE OF TRIAL TO ALLOW TIME TO PREPARE

Phillip P. Weidner
900 West Fifth Avenue
Anchorage, Alaska 99501

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

GEORGE H. LUSTIG, et al.,)

Defendants.)

Cause No. A-76-51 Cr.

**MOTION FOR
CONTINUANCE**

COMES NOW the defendant, GEORGE H. LUSTIG, by and through his attorney, PHILLIP P. WEIDNER, and hereby moves this court to grant a continuance of the trial in these proceedings for a period of sixty (60) days on the grounds that as reflected in the attached affidavit of counsel, said period is necessary to effective assistance of counsel of his choice. Further, as reflected by the previous motions and proceedings in this case and by the attached affidavit, defendant's pre-trial incarceration has made it impossible for him to secure counsel of his choice and he has only recently been successful in doing so. Further, as reflected by the attached affidavit, counsel of his choice is endeavoring to prepare forthwith for the instant proceeding such that a day certain trial can be set within sixty (60) days. Moreover, defendant is fully prepared to waive any speedy trial rights he might have for said sixty (60) day period.

DATED at Anchorage, Alaska, this 21st day of April, 1976.

/s/

PHILLIP P. WEIDNER

[R.-233; C.A. 9th 76-2661] Attorney for George Lustig

V. MOTION FOR STAY OF TRIAL PENDING REVIEW
[R.-238; C.A. 9th 76-2661]

Mr. Phillip P. Weidner
 900 West Fifth Avenue
 Anchorage, Alaska 99501

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ALASKA

UNITED STATES OF AMERICA.)

Plaintiff,)

vs.)

) Cause No. A-76-51 Cr.

GEORGE H. LUSTIG, et al.,)

Defendants.)

) **MOTION FOR STAY**
) **PENDING REVIEW**

COMES NOW the defendant, GEORGE H. LUSTIG, by and through his attorney, PHILLIP P. WEIDNER, and hereby moves this court to issue a stay of the trial in these proceedings now set for April 26, 1976, and the order denying his motion for a continuance on the grounds that, as reflected in the attached affidavit of counsel, said counsel intends forthwith to travel to San Francisco to request the Ninth Circuit Court of Appeals to issue a stay of the trial on the grounds that the continuance requested is necessary for effective assistance of counsel.

This motion is made pursuant to the requirements of Appellate Rule 8 and Criminal Rule 38(a). Further, this motion is made on the grounds that defendant intends to pursue his rights under Appellate Rule 5 to move for an appeal of the interlocutory order under 28 U.S.C., Section 1292(b).

VI. MOTION TO SUPPRESS

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

GEORGE LUSTIG,)

Defendant.)

No. A76-51

MOTION TO SUPPRESS

COMES NOW the defendant by and through his attorney of record, and moves this Court to suppress all evidence and items seized from the truck defendant, GEORGE LUSTIG, was allegedly driving at the time of his arrest on the grounds that there was no search warrant for the search of the truck. The search was not incidental to an arrest as the truck was searched after Mr. Lustig was in custody and not incident to an arrest. Defendant also moves to suppress all items that the Government may intent to use against him as a result of a search of Mr. Lustig's homestead on the grounds that the affidavit supporting the search was not sufficient to authorize a search during the night time based on analysis of affidavits.

DATED this 30th day of March, 1976.

KAY, CHRISTIE, FULD & SAVILLE

/s/

[R.-43; C.A. 9th 76-2661]

WILLIAM H. FULD

**VII. MOTION TO RECONSIDER DENIAL OF SUPPRESSION
MOTION**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

GEORGE H. LUSTIG; GREGORY D.)
PEDERSON; CHERYL RAE SMITH,)
a/k/a SHERRI L. PEDERSON,)

Defendants.)

No. A76-51

**MOTION TO RECONSIDER PARAGRAPH NINE OF THE
COURT'S ORDER**

NOW COMES the defendant, GEORGE LUSTIG, and moves the court to reconsider its rulings regarding motion to suppress on the grounds that defense was not aware of the factual basis and could not be aware of the factual basis until certain police reports were produced which were done after the motion was made. Furthermore, the attached memorandum demonstrates the factual basis would depend on a hearing. We believe the police testimony would show that there was a search of the truck after Lustig had been removed from the truck.

DATED this 16th day of April, 1976.

KAY, CHRISTIE, FULD & SAVILLE
/s/

[R.-210; C.A. 9th 76-2661]

WILLIAM H. FULD

VIII. MEMORANDUM REGARDING SUPPRESSION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

GEORGE H. LUSTIG; GREGORY D.)
PEDERSON; CHERYL RAE SMITH,)
a/k/a SHERRI L. PEDERSON,)

Defendants.)

No. A76-51

MEMORANDUM REGARDING SEARCH AND SEIZURE

All of the Government's memorandums point out that defendant GEORGE LUSTIG has not cited adequate legal authority and failed to supply evidence that the search of the truck was not incidental to the arrest. Attached to this memorandum is a page of the police report which was just produced. This police report shows evidence that "a subsequent search of the vehicle revealed marijuana, scales and a bag sealing machine".

Based on conversations with defendant, I believe that an evidentiary hearing would establish that there was a search of the vehicle in which Lustig was arrested and that the items discovered were not in plain sight and that at the time of the search, Lustig was not in the presence of the vehicle being searched, having been removed to the police car. For these reasons and based on the following authorities, we believe an illegal search of a vehicle took place. Note that even the cases cited by the defendant on search of a vehicle seem to emphasize

a seizure of property in plain sight (see page 4 of plaintiff's brief) is proper and not prohibited. Therefore the authorities cited by the government do not compel admission. On a search without a warrant, the government should have the burden of persuasion that the search was legal. We would cite the following authorities: *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), stands for the proposition that just because an automobile was involved, does not mean that the police can do away with warrant requirements, nor does the defendant lose the protection of the Fourth Amendment and his right to privacy, see also, *People v. Miller*, 496 P.2d 1228 at 1231 (California 1972). The police may certainly conduct a limited frisk of persons properly arrested and anything seized on the person may be used against them, *U.S. v. Robinson*, 414 U.S. 218 (1973), however, a search without a warrant is limited to the arrestee's person and the area in his immediate control, *Shimel v. California*, 395 U.S. 752 and *Terry v. Ohio*, 392 U.S. 27. These cases point out the policy of the law is to place a neutral judge between police wanting to search and individuals asserting their right to privacy.

We believe under the applicable law, a hearing would establish lack of exigent circumstances since the vehicle was in fact impounded, lack of probable cause to search the vehicle and that the so-called contraband was discovered by a search. A hearing would establish that two State Troopers who had some contact with Mr. Lustig, but had no knowledge that the vehicle in which he was stopped had ever been used for transporting narcotics.

DATED this 16th day of April, 1976.

KAY, CHRISTIE, FULD & SAVILLE
/s/

[R.-212; C.A. 9th 76-2661]

WILLIAM H. FULD

IX. DENIAL OF MOTION TO RECONSIDER SUPPRESSION ISSUES

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

GEORGE H. LUSTIG; GREGORY D.)

PEDERSON; CHERYL RAE SMITH)

aka SHERRI L. PEDERSON,)

Defendants.)

No. A76-51 Cr.

ORDER

THE CAUSE comes before the court upon defendant Lustig's motion to reconsider paragraph nine of this court's order of April 16, 1976. That paragraph denied Lustig's motion to suppress for failure to establish any legal or factual foundation for such motion.

Lustig has yet to make the specific, detailed, and non-conjectural factual allegations that are a prerequisite for an evidentiary hearing. *United States v. Amidzich*, 396 F. Supp. 1140, 1145-46 (E. D. Wis. 1975). Furthermore, the court does not understand how Lustig could, in good faith, allege facts that would require suppression of the evidence seized. Giving Lustig every reasonable factual inference, it would appear that the search was incident to a lawful arrest. *United States v. Berryhill*, 445 F.2d 1189 (9th Cir. 1971); *United States v. Wood* 468 F.2d 1024 (9th Cir. 1972); *United States v. Lee*, 505 F.2d 845, 855 (9th Cir. 1974).

Accordingly, IT IS ORDERED:

THAT defendant Lustig's motion to suppress is denied.

DATED at Anchorage, Alaska, this 19th day of April, 1976.

/s/

United States District Judge

cc: U. S. Attorney
William H. Fuld
F. P. Pettyjohn
Ronald West

[R.-218; C.A. 9th 76-2661]

X. MOTION TO SUPPRESS

Mr. Phillip P. Weidner
900 West Fifth Avenue
Anchorage, Alaska 99501

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

GEORGE H. LUSTIG, et al.,)

Defendants.)

Cause No. A-76-51 Cr.

MOTION TO SUPPRESS

COMES NOW the defendant, GEORGE H. LUSTIG, by and through his attorney, PHILLIP P. WEIDNER, and hereby moves this court to issue an order suppressing the use of any of the fruits of the illegal arrest of the defendant occasioned by the service on defendant of a federal warrant for his arrest by officers and/or agents of the State of Alaska absent an adequate prior showing on the record of the necessity for such warrant rather than a summons pursuant to Criminal Rule 9, Criminal Rule 4, and the comparable criminal rules government procedure in the state courts, and governing the service of warrants by state officers, and the appropriate state statutes relating to service of said warrants.

Further, the defendant moves to suppress the use of any of the fruits of the illegal search of the defendant's vehicle. Specifically, defendant maintains that said search was not a valid "inventory search", not a valid search incident to an arrest,

since that search was conducted by state officers who would be governed by *Daygee v. State*, 514 P.2d 1159 (Alaska 1973); *Schraff v. State* (Alaska Supreme Court 1975); and *Speitz v. State*, (Alaska Supreme Court 1974).

Further, the defendant moves to suppress the scales and sealing machine alleged seized from his vehicle on the grounds that said search and seizure was conducted by state authorities governed by the Alaska State Constitution and the appropriate Alaska rules and statutes and said constitution, rules and statutes prohibit the seizure of mere evidence absent a valid search warrant. *See, Daygee v. State, supra*.

DATED at Anchorage, Alaska, this 23rd day of April, 1976.

/s/

PHILLIP P. WEIDNER
Attorney for George Lustig

[R-263; C.A. 9th 76-2661]

XI. MOTION TO RECONSIDER ON SUPPRESSION ISSUES AND SUPPORTING MEMORANDUM

IN THE UNITED STATES DISTRICT COURT FOR THE STATE OF ALASKA

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

) Cause No A 76-51 Cr.

GEORGE H. LUSTIG et al,)

Defendant.)

MOTION TO TAKE JUDICIAL NOTICE AND RECONSIDER ON ISSUES OF SUPPRESSION.

NOW COMES the defendant George H. Lustig by and through his attorney Phillip Weidner and requests that this court:

1) Reconsider its earlier ruling pertaining to the warrantless search and seizure on February 27th 1976 of a vehicle allegedly driven by the defendant at the time of his arrest as well as the unlawful and warrantless seizure of items in that truck, all of which is in violation of the defendants Constitutional Rights as guaranteed by the 4th amendment. The defendant urges this court to reconsider and suppress before the evidence's introduction into evidence which will irreperably prejudice the jury.

2) Further reconsider its earlier ruling regarding an evidence hearing to determine factual issues in the above search so that the government may be given an opportunity to meet its burden of establishing an exception to the warrant requirement.

3) Further take judicial notice of the case of *United States*

v. Bidwell. NOW PENDING IN THE United States District Court of Alaska (Judge Fitzgerald) where on facts believed to be similar to this case, the trial court suppressed evidence seized as being unlawful, and establishes good cause to reconsider.

4) This motion and all previous motions to Suppress and hold an evidentiary hearing is further supported by the attached supplemental motion and supplemental authority which defendant hopes will be of assistance to the court.

By: /s/

Phillip P. Weidner

DATED THIS 2nd day of May, 1976.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

UNITED STATES OF AMERICA.)

Plaintiff.)

vs.)

) Cause No A-76-51 Cr.

GEORGE H. LUSTIG, et al.)

Defendant.)

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
MOTION TO RECONSIDER AND SUPPRESS CITING
ADDITIONAL AUTHORITY.**

It is again stated that Defendant urges this court to recognize that absent probable cause to search the vehicle defendant was

allegedly driving on February 27th, that the seizure and search of the vehicle may not stand. Once the defendant is out of the car and arrested, he is not proximate to the vehicle to justify the search incident exception. Absent a warrant it is the states burden to establish at an evidentiary hearing that there is an exception to the warrant requirement.¹

At this point in the trial the evidence has been in sight of the jury, but not introduced and not alluded to by testimony. There is still time for this court to grant an evidentiary hearing out of the presence of the jury, to suppress any illegally seized evidence and avert undue influence on the jury.

The only authority cited by the government in support of a search like this is the case of *U.S. v. Robinson*, 414 U.S. 218 (1973). The holding in that case is strictly limited to searches of person, and has nothing to do with searches of cars when the defendant has already been removed. Defendant at an evidentiary hearing could establish that the search took place well after his arrest and removal from the car, and further that the automobile was not interfering with traffic but was on the side of the road. Absent probable cause the Police had no occasion to search and seize the vehicle.

In the attached recent search case, the Supreme Court in *Texas v. White*, 96 S.Ct. 304 (1975) upheld a search of an automobile but again stressed that there must be probable cause to believe contraband as in the car. *Chambers v. Marony*, 399 U.S. 42, 90 S.Ct. 1975. The probable cause in *Texas v. White, Supra*, is absent in this case. The attached Law Review Article adds further support to the necessity of probable cause to search the vehicle, independent of the police authority to arrest the Defendant, and the attached motions and decision by Judge Fitzgerald (now being appealed to the 9th Circuit) further underline the problem as being one of merit.

Defendant thus urges this court to reconsider its earlier ruling regarding time and recognize good cause while there is still time to grant an evidentiary hearing and suppress illegally seized evidence, in order to avoid prejudicial introduction of the evidence.

Of critical importance is the fact that there was no necessity to impound and inventory the vehicle, and that the defendant in no way requested such an impoundment or desired it. See *Texas v. White Supra*, (Dissenting Opinion Of Brennan)

By: /s/
Phillip Weidner

Dated This 2nd day of May, 1976.

1. Admitted in Opposition Memo page 3.

[R.-385; C.A. 9th 76-2661]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. A 75-109 Cr.
)	
ROBERT LLOYD LUSK, BILLY)	MEMORANDUM AND
JOE BIDWELL, and SUSAN)	ORDER GRANTING
CAROL RUSTIGAN,)	MOTION TO SUPPRESS
)	
Defendants.)	
)	

On December 12, 1975 an evidentiary hearing was held on defendant Bidwell's motion to suppress the evidence seized from his vehicle. At the conclusion of the evidence, the court found that the plain view of what appeared to be an amphetamine tablet on the front seat of the vehicle did not constitute probable cause to search the vehicle for concealed drugs.

Even assuming that the plain view of what appeared to be an amphetamine tablet on the front seat of Bidwell's vehicle gave the police probable cause to search the vehicle for concealed contraband, the warrantless search and seizure was illegal unless there were exigent circumstances justifying the failure to procure a warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971); *United States v. McCormick*, 502 F.2d 281, 287 (9th Cir. 1974). The government has not shown the existence of exigent circumstances.

The government seeks to justify the warrantless search of the vehicle on two alternative grounds: (1) 49 U.S.C. §782 authorized the police to make an immediate warrantless seizure of the

vehicle on the belief that it was being used, or had been used, to carry contraband; (2) The officers had the right to impound the vehicle after Bidwell's arrest and to inventory its contents.

The Ninth Circuit has rejected the government's contention that 49 U.S.C. §782 independently authorizes the warrantless seizure of a vehicle that the police have probable cause to believe was being used or had been used to conceal or transport contraband. *United States v. McCormick*, 502 F.2d 281 (9th Cir. 1974), held that before seizing a vehicle under Section 782, the police must first obtain a valid warrant except in circumstances which qualify as an exception to the warrant requirement. Moreover, the government cannot rely on 49 U.S.C. §782 to justify the search in this case because the record establishes that the government did not seize the vehicle for forfeiture purposes and has not instituted forfeiture proceedings.

Alternatively, the government contends that the police had the right, pursuant to the rules and procedures of the Alaska State Troopers, to impound the vehicle subsequent to Bidwell's arrest and to inventory the contents of the vehicle. There is considerable authority upholding the seizure of contraband during inventory of property in a vehicle that has been impounded pursuant to standard police procedure. See *United States v. Mitchell*, 458 F.2d 960 (9th Cir. 1972); *Cooper v. California*, 386 U.S. 58 (1967). These cases establish the rule that an inventory search of a vehicle is valid where the police have lawfully impounded a vehicle. In the seizure of Bidwell's car, however, it appears that the police deviated from Alaska procedure.

Under Alaska law the inventory of the contents of a vehicle is proper and is, in fact, required when the police must take custody of a vehicle. The Alaska Administrative Code, however, does not give police officers carte blanche to seize a vehicle

when the operator is arrested but provides instead that the arrestee may elect to have an available person or two car operator remove his vehicle. 13 A.C.C.02.350. There is no showing here that the government followed the code procedure for removing Bidwell's vehicle. Therefore, the search cannot be sustained as a valid inventory search.

Having found that there was neither probable cause to search Bidwell's vehicle for concealed contraband nor exigent circumstances to justify the warrantless search and that the search cannot be sustained on the basis of either 49 U.S.C. §782 or 13 A.C.C. 02.350,

IT IS ORDERED that defendant Bidwell's motion to suppress the evidence seized from his vehicle is granted.

MADE AND ENTERED at Anchorage, Alaska, this 7th day of January, 1976.

/s/

JAMES M. FITZGERALD
United States District Judge

cc: U.S. Attorney
Hal Horton
Joseph Palmier
Sandra Saville

[R.-410; C.A. 9th 76-2661]

**XII. MOTION FOR MISTRIAL DUE TO DENIAL OF RIGHT
TO BE PRESENT**

Mr. Phillip Weidner
900 West Fifth Avenue
Anchorage, Alaska 99501

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

UNITED STATES OF AMERICA,)	
Plaintiff,)	
)	
vs.)	Cause No. A-76-51 Cr.
)	
GEORGE H. LUSTIG, et al.,)	
Defendants,)	
)	

MOTION FOR MISTRIAL

NOW COMES the defendant, George H. Lustig, and requests that this court grant a mistrial of the above-captioned case pursuant to the 6th and 8th amendment and criminal rule of Federal Procedure 43. This motion is supported by the following memorandum and attached authority.

By His Attorney: /s/
PHILLIP P. WEIDNER

DATED this 29th day of April, 1976.

[R-316; C.A. 9th 76-2661]

**XIII. MEMORANDUM IN SUPPORT OF MOTION FOR
MISTRIAL DUE TO RIGHT TO BE PRESENT**

Mr. Phillip P. Weidner
900 West Fifth Avenue
Anchorage, Alaska 99501

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ALASKA**

UNITED STATES OF AMERICA,)	
Plaintiff,)	
vs.)	Cause No. A-76-51 Cr.
GEORGE H. LUSTIG, et. al.,)	
Defendants,)	

MEMORANDUM IN SUPPORT OF MOTION

The record will reflect that on Wednesday, May 28th, 1976 in the morning, a juror in the above-captioned case approached the trial court judge and communicated an indication of his difficulty in sitting as an impartial juror. The trial court judge then questioned the juror as to the nature of the problem in his chambers. The defendant, George H. Lustig, was not present during the examination of the juror. Nor was defense counsel. The judge then returned to open court and in the presence of counsel and the defendant explained the problem existed. The trial court judge did not divulge the exact nature of the alleged prejudice except to say that the juror had indicated that he realized during testimony that he had a friend that might have had some problems with one of the defendants which might make impartiality difficult. The exact nature of the "problem" and the defendant referred to still remains unknown to defendants. At this point the trial court inquired of counsel if there was objection to the removal of the juror during trial. Defendant Lustig then moved that the court hold a hearing on the record so that the defendant might be present during the examination

of the juror so that he might know the nature of the stated prejudice and thus intelligently decide whether or not to object to the removal of the juror and thereby consent to the seating of the alternate. The defendant also requested a hearing in his presence so that he might enjoy his right to be present at all stages of the trial. These requests were denied. The defendant then objected to the removal of the juror absent opportunity for the defendant to have a hearing on the record and in his presence. Over objection, the trial court removed the juror and seated the alternate.

It is the position of the defendant that the removal of the juror under these circumstances is grounds for a mistrial because it effectively denies him his constitutional rights as guaranteed by the 5th and 6th amendments to the United States Constitution as well as Criminal Rules 43 of Federal Procedure. Rule 43 states:

The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict and at the imposition of sentence except as otherwise provided by this rule.

Rule 43(c) then lists four exceptions to the rule. Questioning of a juror for potential prejudice is not one of the four exceptions to the rule. On the contrary the specific inclusion requiring defendants presence during initial questioning of the jury seems a clear indication that later questioning of a juror would equally mandate the defendant's presence. The important purpose of Rule 43 is clear.

"A leading principal that pervades the entire law of criminal procedure is that after the indictment found nothing shall be done in the absence of the prisoner." *Lewis v. U.S.*, 1892, 13 S. Ct. 136, 137, 146 U.S. 370, 372. Wright, Federal Practice and Procedure Volume 3, Section 721 and many cases cited therein.

[R.-317; C.A. 9th 76-2661]

XIV. MOTION TO REOPEN OR DECLARE A MISTRIAL DUE TO DENIAL OF OPPORTUNITY TO CALL PHYLLIS RESNEK

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GEORGE H. LUSTIG, et al.

Defendants.

No. A 76-51 Cr.

MOTION TO REOPEN OR DECLARE A MISTRIAL

Comes now the defendant, George Lustig, by and through his attorney, Phillip P. Weidner and hereby moves this court to allow him to reopen the evidence in this proceeding to call the witness Phyllis Resnek as a witness in his case in chief or as a surrebuttal witness. In the alternative the defendant requests this court to declare a mistrial. This motion is based on the grounds that the defendant's constitutional right to call witnesses in his behalf, and his constitutional right to cross examine and confront his accusers has been violated by the refusal of a requested four hour continuance to call said witness. Further as reflected by the attached affidavit, said witness was in fact contacted by the defendant's investigator at 2:30 P.M. on May 11, 1976 and was then available to testify.

Respectfully submitted,

[R.-504; C.A. 9th 76-2661] Phillip P. Weidner

**XV. REQUEST FOR HEARING AS TO EFFECTS OF
FAILURE TO GRANT INDIVIDUAL JUROR POLL
IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ALASKA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. A-76-51 Cr.
)	
GEORGE H. LUSTIG, et al.,)	REQUEST FOR
)	HEARING
Defendants,)	

COMES NOW the defendant, GEORGE H. LUSTIG, by and through his attorney, PHILLIP P. WEIDNER, and hereby requests this court to grant him a hearing in open court on the attached Motion for a New Trial, Motion for Permission to Interview Jurors or Take Deposition of Jurors, and Motion for Mistrial.

This request is made on the grounds that as reflected by the attached affidavits and memorandum, counsel for the defendant has good cause to believe that the verdict purportedly entered against defendant Lustig in these proceedings was not unanimous, and counsel for the defendant wishes to make a formal offer of proof on the record as to the basis of his reason for said belief, such that the defendant's right to a clear record for purposes of appeal may be preserved.

Respectfully submitted this 19th day of May, 1976, at Anchorage, Alaska.

PHILLIP P. WEIDNER

[R-582; C.A. 9th 76-2661] Attorney for Defendant Lustig

**XVI. MOTION FOR NEW TRIAL DUE TO
NON-UNANIMOUS VERDICT**

Phillip P. Weidner
425 G Street, Suite 520
Anchorage, Alaska 99501

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ALASKA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. A-76-51 Cr.
)	
GEORGE H. LUSTIG, et al.,)	MOTION FOR A NEW
)	TRIAL
Defendants,)	

COMES NOW the defendant, GEORGE H. LUSTIG, by and through his attorney, PHILLIP P. WEIDNER, and hereby moves this court pursuant to Criminal Rule 33, to enter an order granting him a new trial in these proceedings, on the grounds that said new trial is required in the interest of justice.

Specifically, as reflected in the attached affidavit and memorandum, it is the position of the defendant Lustig that the verdicts entered against him in these proceedings were not pursuant to unanimous decision of the trial jurors as mandated by the United States Constitution, the Constitution of the State of Alaska, Criminal Rule 31, and Criminal Rule 23.

Further, it is the position of the defendant Lustig that the denial of his request to poll the jury individually as to each count contributed to the failure of the juror or jurors who were in the minority to speak in open court. Thus, the defendant maintains that a new trial should be ordered forthwith since

said denial of the poll was in contravention of Criminal Rule 31(d), and the defendant's constitutional and common-law right to a unanimous verdict guaranteed by a poll with regard to each individual count in open court.

Thus, defendant respectfully requests this court to consider evidence forthwith from said minority juror or jurors, and to declare a new trial be granted in the interest of justice.

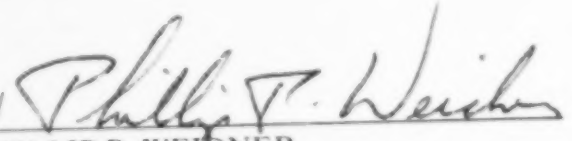
Further, this motion is timely since made within seven (7) days after verdict pursuant to Criminal Rule 33.

DATED at Anchorage, Alaska, this 19th day of May, 1976.

PHILLIP P. WEIDNER
Attorney for Defendant Lustig

[R-585; C.A. 9th 76-2661]

Filed in the Supreme Court of the United States on behalf of the Petitioner, George H. Lustig, this ²⁹ day of September, 1977.

/s/ 
PHILLIP P. WEIDNER
Attorney for Petitioner
George H. Lustig

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that pursuant to Rule 21(1), Rule 33(1), Rule 33(2)(1), and Rule 33(3)(b), of the Supreme Court Rules of Appellate Procedure, that I am a member of the Bar of the U.S. Supreme Court in good standing, and that three copies of the foregoing Appendix D and Appendix E to Petition for A Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit were served upon counsel for the Respondent, by depositing the same in the United States mail at Anchorage, Alaska, postage pre-paid, addressed to:

Mr. G. Kent Edwards
U.S. Attorney
605 West Fourth Avenue
Anchorage, Alaska 9950

and further, that three copies of the foregoing Appendix D and Appendix E to Petition for A Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit was served upon the Solicitor General of the United States by depositing the same in the United States mail, at Anchorage, Alaska, postage pre-paid, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

and further, that three copies of the foregoing Appendix D and Appendix E to Petition for A Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit were served upon counsel for both co-defendants in the instant proceedings below, by depositing the same in the United States mail at Anchorage, Alaska, postage pre-paid, addressed to:

Mr. F. P. Pettyjohn
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DATED at Anchorage, Alaska, this 29th day of September, 1977.


PHILLIP P. WEIDNER
Attorney for Petitioner
George H. Lustig